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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1931

No. 411

GALVESTON WHARF COMPANY, et al,
Petitioners,

vs.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY, et al,
Respondents.

SUPPLEMENTAL BRIEF OF GALVESTON WHARF COMPANY ON WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

In view of the fact that all the points relied upon by the Galveston Wharf Company in this case are covered by the brief in support of the petition for writ of certiorari, we do not deem

it necessary to file an additional brief, but we do desire to call the court's attention to one or two errors made in the printing of the brief and to amplify the questions presented in the brief, in view of the brief filed by the Galveston, Harrisburg & San Antonio Railway Company.

POINT ONE

On page five of our brief, in the argument on Point One, the printer used the expression "disputed evidence", when the language should have been "undisputed evidence". In other words the evidence cited by the Supreme Court of Texas set out in the brief on pages 5 and following is undisputed evidence.

To our minds it is astonishing that the Supreme Court of Texas should hold that at the time of the fire in this case possession of the shipment in question had passed from the Mallory Steamship Company to the Galveston Wharf Company, when that court has found as undisputed evidence the following facts:

1. That as to the understanding at the time of the fire as to when the Galveston Wharf Company took possession, the general understanding was that shipments were taken possession of when they were lifted from the floor of the pier and

deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines (the Galveston, Harrisburg & San Antonio Railway Company). (Record, p. 153.)

2. That whenever the Galveston Wharf Company got ready to pick up a carload lot at Pier 24 and put it on a car, it took a copy of the billing and, with a clerk of the Mallory Steamship Company, checked the carload lots and picked them up and took them over to the cars. (Record, p. 55.)

3. That at the time the fire occurred on January 13, 1926, the Galveston Wharf Company had done absolutely nothing to take possession of the shipment of sardines. They had not handled it in any way. At the time of the fire they had not begun the service for which they were going to be paid by the Galveston, Harrisburg & San Antonio Railway Company. (Record, pp. 152-53.)

4. That the steamship company claimed the right under proper orders to divert the shipment at any time prior to the actual loading by the Galveston Wharf Company into the cars of the railway company. (Record, p. 154.)

5. That on the night in question at the time of the fire the Mallory Steamship Co. was exer-

cising dominion and control over the shipment as it was being policed by the Mallory Steamship Company, thus exercising dominion and control over the shipment. (Record, p. 154.)

6. That after the fire whatever remained of the cargo was salvaged by the Mallory Steamship Company. (Record, p. 154.)

In addition to these undisputed facts cited by the Supreme Court of Texas as the evidence in the record, the following facts are undisputed:

1. That at the time the fire occurred on the night of January 13, 1926, the time had not arrived when, in the ordinary course of business, the Galveston Wharf Company would have begun its first service, consisting of picking up the shipment from the Mallory Steamship Company's unloading depot and transferring it to the cars of the Galveston, Harrisburg & San Antonio Railway Company. (Record, p. 76.)

2. That at the time the fire occurred there had been no check of the shipment involved in this case by the clerks of the Mallory Steamship Company and the Galveston Wharf Company, and no receipts had been given by the Galveston Wharf Company to the Mallory Steamship Company. (Record, pp. 62 and 76.)

3. Under the universal custom existing with reference to the handling of freight, while the receipts based on the joint checking of the Mallory Steamship Company and the Galveston Wharf Company might be delivered to the Steamship Company for several days after the shipment had been picked up, they always bore the date on which the shipment was actually picked up from the pier. (Record, pp. 49, 58, 62 and 64.)

4. The shipment involved in this case had been damaged and had to be repaired or recoopered by the Mallory Steamship Company. It was repaired or recoopered by the Steamship Company about four o'clock in the afternoon of the day on which the fire occurred, but there is no evidence indicating that the Galveston Wharf Company was notified that the recoopering had been done and that the shipment was ready to go, and in the ordinary course of business the Galveston Wharf Company would not have known of this fact until the following day, when it would have picked up the shipment from Pier 24.

5. Under the undisputed evidence the Mallory Steamship Company, by its failure to give the Galveston Wharf Company notice that the damaged portion of the shipment had been repaired, impliedly agreed that such notice might be ac-

quired by the Galveston Wharf Company in the due course of business.

6. The written lease contract between the Galveston Wharf Company and the Mallory Steamship Company provided that the Wharf Company "shall in no way be responsible for any loss and damage to any goods or cargoes handled over and through said wharves, sheds and warehouses unless same be caused by defects in the roofs of warehouses." (Record, p. 83.)

7. After the damaged part of the shipment had been repaired by the Mallory Steamship Company the Galveston Wharf Company was not afforded a fair opportunity in the due and ordinary course of its business to possess the goods.

If there had been no fire and on the night of the 13th of January, 1926, some thief or pilferer had entered the premises of the Mallory S. S. Company, where these goods were located, and had appropriated some of the merchandise in this shipment, on the following day, in the ordinary course of business, when the Galveston Wharf Company checked with the S. S. Company the items composing this shipment, it would have developed that the parts of the shipment stolen or pilfered were not on hand, and the Galveston Wharf Company would have given a receipt in due course

for them as of the date of the checking, for the amount of the shipment, less the items that had been stolen. If no fire had occurred, we do not believe that any one connected with this case would have contended that under such circumstances, the Mallory S. S. Company would not have been responsible for the parts of the shipment stolen during that night. While it was exercising dominion over the shipment. A fire occurred on the night in question, the origin of which is unknown, and destroyed the shipment involved. The responsibility of the Mallory S. S. Company is the same in the case of the fire as it would have been in the case of the pilferer.

The only evidence we have been able to find in the entire record in this case upon which the Mallory Steamship Company might attempt to rely as in conflict with the above undisputed facts is the statement of one of the witnesses for the Mallory Steamship Company that he considered they delivered freight to the Wharf Company when it was in readiness to be lifted from the pier and loaded into railway cars, that there was nothing else to be done by the Mallory Steamship Company. The witness who was the author of this conclusion was the same witness who testified to one of the undisputed facts above outlined to the effect that the clerks of the Mallory Steam-

ship Company and the Galveston Wharf Company would check the shipments as they were lifted from the pier. This conclusion of such witness can be given no probative force, because it is a mere legal conclusion which is affirmatively shown not to be supported by the undisputed evidence in this case.

Railway Company vs. Phillips, 63 Tex. 590;

San Antonio Water Supply Co. vs. Castle, 199 S. W. 300;

C. R. I. & G. Ry. Co. vs. Johnson, 224 S. W. 217.

We respectfully refer this honorable court to the decisions of the Federal Court to the effect that before delivery of a shipment can be made, the party to whom it is to be delivered must have a reasonable time to possess the shipment.

Richardson vs. Goddard, 16 U. S. (L. Ed.) 412, 23 How. 28;

Mary Washington, 1 Abb. 1, Chase 125, 16 Fed. Case No. 9229;

Carana vs. British, etc., 6 Ben. 517, 5 Fed. Cas. No. 2484;

Turner vs. Huff, 55 Am. Rep. 580.

We respectfully submit to this honorable court that under the undisputed evidence shown by the

record and under the undisputed evidence found by the Supreme Court of Texas, at the time the fire which damaged the shipment involved in this litigation occurred the possession of the shipment was with the Mallory Steamship Company and it was exercising dominion and control over the same as a carrier. The Supreme Court of Texas, by its decision and holding that the possession of this shipment was with the Galveston Wharf Company, has attempted to place upon the Galveston Wharf Company the severe liability of an insurer of this shipment, simply because the Galveston Wharf Company had made an agreement which in substance meant that on January 14, 1926, (the day after the fire) it would check the shipment with the Mallory Line and pick up the shipment from the unloading depot of the Mallory Steamship Company, provided it was ready to move, and place it in the cars of the Galveston, Harrisburg & San Antonio Railway Company.

POINT TWO

In our original brief filed in support of petition for writ of certiorari, we called this honorable court's attention to the case of Missouri Pacific Railway Company vs. Reynolds-Davis Grocery Company, 268 U. S. 366, decided May 25, 1925,

by Justice Brandeis. We did not refer the court to any other decision on this question because we felt that such decision of this honorable court was in conflict with the holding of the Supreme Court of Texas in this case to the effect that at the time of the fire the Galveston Wharf Company held the shipment involved in this litigation as a connecting carrier without liability of an insurer. We respectfully submit that the criticisms of this case by counsel for the Mallory Steamship Company and the Galveston, Harrisburg & San Antonio Railway Company as authority for our position here are without merit. The substance of the criticisms of this authority of this honorable court in support of our position is that in the Reynolds-Davis Grocery Company case suit was not brought against the St. Louis, San Francisco Railway Company, the switching carrier. The bill of lading in the Reynolds-Davis Grocery Company case contained a valid provision exempting the Missouri Pacific Railway Company from any and all liability upon delivery of the shipment to the next connecting carrier. This honorable court held that the Missouri Pacific Railway Company could not rely upon this provision because the St. Louis & San Francisco Railway Company, the switching carrier, to whom the Missouri Pacific Railway Company delivered the shipment,

was not a connecting carrier, but merely a switching agent of the Missouri Pacific Railway Company. We are at a loss to understand why counsel for the various parties have sought to find statutes and decisions to the effect that corporations engaged in a similar business to that of the Galveston Wharf Company are common carriers, that they are carriers under the Safety Appliance Act and other Acts. The position of the Galveston Wharf Company in this case is that because of the facts existing in this case, even if the possession of the shipment was with it, its liability is not that of a connecting carrier, the liability of an insurer. In the Reynolds-Davis Grocery Company case no one could contend that the St. Louis & San Francisco Railway Company was not a common carrier, yet this court said it was not a connecting carrier. If, when this shipment arrived at Galveston, the Mallory Steamship Company or the Galveston, Harrisburg & San Antonio Railway Company had employed a negro laborer to load the shipments from the depot of the Mallory Steamship Company into the cars of the Galveston, Harrisburg & San Antonio Railway Company, could it be successfully contended that this negro laborers was liable as connecting carriers on this shipment? The first service which the Galveston Wharf Company was employed to perform was merely the loading service, and yet, not-

withstanding the undisputed evidence that the time had not arrived for the beginning of this loading service and the Galveston Wharf Company had not begun to perform such service, the Supreme Court of Texas has said that the Wharf Company was responsible for this shipment as an insurer because it held it as a connecting carrier.

We respectfully call this honorable court's attention to the following decisions on this question:

Texas & Pacific Railway Company vs. Scoggins & Brown (Tex. Civ. App), 90 S. W. 321. In this case plaintiffs sued Texas & Pacific Railway Company for damages to a shipment of cattle from Colorado, Texas, to East St. Louis over the lines of the Texas & Pacific Railway Company, and the Missouri-Kansas & Texas Railway Company of Texas. The initial carrier, Texas & Pacific Railway Company, shipped the cattle to the Belt Railway Company at Fort Worth for delivery to the Union Stockyards, where cattle intended for further transportation over the lines of the two Missouri, Kansas & Texas Railway Companies are always delivered. There was evidence indicating that the cattle were injured in Fort Worth. The plaintiffs claimed they were injured through negligence. The Texas & Pacific Railway Com-

pany sought to make the Belt Railway Company a party defendant. The trial court instructed the jury that the Belt Railway Company was not a connecting carrier and that a delivery of the cattle by the Texas & Pacific Railway Company to such Belt Railway would not be a delivery to the next connecting carrier, since the Belt Railway appeared to have been the agency selected by the Texas & Pacific to deliver the cattle at the Union Stockyards. The Court of Civil Appeals said:

> "Under the facts of this case we fail to see that there was error in instructing the jury that the Belt Railway Company of Fort Worth was not a connecting carrier and that a delivery of the cattle to such Belt Railway Company would not be a delivery to the next connecting carrier. We fail to see that the Texas & Pacific Railway Company had any right to join the Fort Worth Belt Railway Company as a party defendant in the action below. The Belt Railway Company appears from the undisputed evidence to have been the agent of the lines connected with this shipment for their mutual convenience at Fort Worth and, if it is liable to them, they have their action against it." (An action for negligence and not as a connecting carrier.)

In the case of St. Louis, Southwestern Railway Company of Texas vs. A. A. Jackson, 118 S. W. 853, the Court of Civil Appeals at Dallas, Texas, said:

> "The car of apples in controversy was consigned at Mednia, New York, to appellee at Dallas, Texas. The St. Louis, Southwestern Railway Company transported said car from Memphis, Tennessee, to Texarkana, Texas, and there delivered said car to the co-defendant, St. Louis, Southwestern Railway Company of Texas, the appellant, who transported the same to Dallas, Texas, and delivered said car to the Terminal Railway Company at Dallas, which Terminal Railway Company in turn delivered it to the Texas & Pacific Railway Company of Texas, to be shifted by the last railway company to the house track of the appellee on the line of the Texas & Pacific Railway Company. **The Texas & Pacific Railway Company, in placing the car on the unloading track, was not a connecting carrier within the meaning of the statute, but acted as the agent of the appellant.**"

The Texas & Pacific Railway Company, a switching carrier, was a party to the suit. In the trial court the suit against the Texas & Pacific Railway Company was dismissed and judgment rend-

ered against the St. Louis and Southwestern Railway Company of Texas, who delivered the shipment to the Terminal Company which in turn delivered it to Texas & Pacific Railway Company to be switched by the company to the house track of the consignee. The Texas & Pacific Railway Company was not named in the bill of lading, was not a party to the contract of carriage.

In the case of Chicago, Rock Island & Gulf Railway Company vs. Young & Ball, 107 S. W. 127, by the Texas Court of Civil Appeals at Texarkana, plaintiff sued the Chicago, Rock Island & Gulf Railway Company and the Belt Railway Company of Fort Worth, the switching carrier, for damages occasioned in shrinkage in weight of cattle occasioned by detention and delay and the alleged failure of the Chicago, Rock Island & Gulf Railway Company to operate its train according to schedule time and with reasonable dispatch, and for negligent unloading of the cattle into unsuitable pens in Fort Worth, Texas, the destination of the cattle. Judgment was rendered against the Chicago, Rock Island & Gulf Railway Company in favor of the plaintiff and in favor of the Belt Railway Company, the switching carrier, against the plaintiff. The Court of Civil Appeals affirmed the judgment in favor of the Belt Railway Company and reversed and

remanded the judgment of the plaintiff against the Chicago Ry. Co. because of an error in the measure of damages adopted by trial court.

In remanding the case for another trial the Court of Civil Appeals said:

> "While handling the shipment the Ft. Worth Belt Railway Company acted as an agent of the appellant, Chicago, Rock Island & Gulf Railway Company, yet it plainly appears that there is no evidence of any delay or of negligence or damage on the part of the Fort Worth Belt Railway Company while the shipment was in its possession; therefore, the case will be affirmed as to the Fort Worth Belt Railway Company and reversed and remanded as to Chicago, Rock Island & Gulf Railway Company."

In the case of Rio Grande Railway Company vs. Kraft & Medero, by the Court of Civil Appeals at El Paso, 212 S. W. 981, plaintiff sued the Southern Pacific, the Rio Grande and the Santa Fe Railway Companies to recover damages to a shipment of cattle. The shipment originated in Arizona and moved over the Southern Pacific to El Paso, Texas, where the cattle were unloaded and watered. Then they moved to Denver, Colorado, over the Santa Fe Railway Company.

The initial carrier billed the shipment to Denver, but when they were received at El Paso by the Rio Grande, such company issued new bills of lading for their shipment from El Paso to Denver. The trial court submitted the issue of negligent, rough handling and negligence in furnishing a defective car with a hole in the floor. Judgment was rendered in favor of the plaintiffs against the Southern Pacific and the Santa Fe Railway Companies. Upon arrival of the shipment at Denver the Santa Fe Railway Company turned same over to the Colorado & Southern Railway Company to be switched to the Denver Stockyards for unloading. There was evidence of some damage occurring while the cattle were in the possession of the Colorado & Southern Railway Company. The court said:

> "The Santa Fe Railway Company complains of refusal of an instruction that it was not liable for death or injury occurring while the cars were being switched by the Colorado & Southern. The record discloses that the Colorado & Southern does the switching to the stockyards for the Santa Fe at Denver. It thus was not acting as a connecting carrier, but as an agent of the Santa Fe in this switching movement. The charge was properly refused."

In the case of Lancaster vs. Hollebecke, by the El Paso Court of Civil Appeals, 235 S. W. 1115, plaintiff sued the receivers of the Texas & Pacific Railway Company for damage to a shipment of horses moving from Pecos, Texas, to Shreveport, Louisiana, over the Texas & Pacific Railway Company via Fort Worth and from Shreveport to Brandon, Missisippi, over the lines of connecting carriers. Plaintiff contended that the animals were unloaded, fed and watered at Fort Worth, that they were reloaded at Fort Worth and remained in the cars for forty-two hours before they were fed and watered at Shreveport, and that when the animals were reloaded at Fort Worth they were placed in old cars with rails protruding therein and were roughly handled in transportation from Fort Worth to Shreveport. The Court of Civil Appeals said:

> "It appears that upon arrival of the shipment at Fort Worth it was delivered by the Texas & Pacific Railway Company to what is referred to in the evidence as the 'Belt', which took them to the stockyards, where they were fed and watered and reloaded. It is contended by appellant that they are not liable for damage sustained by animals by reason of improper condition of the cars into which they were reloaded at Fort Worth, because

the animals were shipped with the Fort Worth Privilege, which means that appellee had the right to terminate the transportation at Fort Worth and sell the animals there, and since the delivery to the Belt Railway at Fort Worth was made because of this privilege, appellants were not liable for the action of the Belt in reloading into defectiye cars. But there is nothing in the evidence to show that the shipment was made with the Fort Worth privilege. The bill of lading provides for transportation of the shipment from Pecos to Shreveport, consigned to Hollebecke at Brandon, Mississippi. It was the duty of the appellants to deliver the shipment in Fort Worth at the stockyards, where they could be unloaded, fed and watered as the law requires, and when the journey was resumed, to furnish proper cars into which they might be reloaded. If it delegated this duty to the Belt, it is answerable for an improper discharge of the same."

In the case of Texas & Pacific Railway Company vs. Henson, by the Supreme Court of Texas, 132 S. W. 1118, by Chief Justice Gaines, suit was brought against the Texas & Pacific Railway Company. The Texas & Pacific Railway Company filed a cross action against the Fort Worth

Belt Railway Company. Judgment of the Court of Civil Appeals affirmed judgment for plaintiff and affirmed judgment sustaining a plea of privilege to be sued in another county by the Belt Railway Company. The Supreme Court affirmed judgment for the plaintiff against Texas & Pacific Railway Company and reversed and remanded judgment for the cross defendant, Belt Railway Company. The court said:

> "It may be doubtful whether the Fort Worth Belt Railway Company is a railroad company in the broad sense of those terms, or a common carrier, but that it is a transportation company, we have no doubt. Our conclusion is that the Fort Worth Belt Railway Company is a transportation company within the meaning of the statute quoted, and when it carries the cars of another company loaded with livestock from the intersection with such other company to the stockyards at Ft. Worth, **and it fails to exercise proper care in the carriage or handling of such livestock, it becomes liable to the plaintiff or to the company for which it acts in the transportation of the livestock, for all damages resulting from its negligence in so doing.**"

In the case of Hooper vs. Chicago & Northwestern Railway Company, 9 Amer. Reports, 443,

plaintiff delivered merchandise to defendant for transportation to a point beyond its lines and received a bill of lading providing that the goods should be forwarded to defendant's terminal station. The goods were so forwarded and were stored in defendant's warehouse, where they were destroyed. The railway company contended that under the bill of lading it was charged only with the duty of transporting the goods to Chicago and of depositing them in its warehouse, and that when it had done so its duties as a carrier ended and was thence liable only in the capacity of a warehouseman. The evidence showed that under the custom and course of dealing the railway company was charged with the duty of delivering the goods to the next connecting carrier for shipment to Boston. The railway company contended that under the custom freight arriving at Chicago over its lines and destined to points beyond was unloaded into its warehouse and was then placed in a particular portion of said warehouse set aside for such freight, and it was then delivered to one Huntoon, who owned teams and horses and who was engaged in the business of a common carrier in Chicago; that Huntoon was a common carrier between the terminus of the company's road, its depot in Chicago and the places where other lines of transportation commenced, and, in this case, the docks where the flour was

to be delivered to the succeeding carrier by water, and that the deposit of the flour in that part of the company's warehouse where Huntoon was accustomed to receive and take all goods to be transferred by him was a delivery to Huntoon as the next carrier in the course of transportation, and full performance of the contract on the part of the company. Chief Justice Dickson said:

> "If the evidence showed that Huntoon was a common carrier of goods in the way specified, then it might become necessary to consider the effect of depositing the goods in the warehouse, as testified by the witnesses, or whether that was a delivery to him, but the evidence does not show that he was such a carrier. On the contrary it shows that **he was a mere transfer agent of the company, or car man, employed by it to deliver the goods to the next carrier in the line of transportation.** It is true that the mode of doing the business was for Huntoon to advance the charges of the company and give receipts for the goods and then collect these charges, together with his own, to the next carrier, but this was for convenience merely and did not change his character as an agent. Huntoon was the transfer agent of the company and not a common carrier as contended."

This rather ancient case throws considerable light upon the question involved in the case at bar. Upon first impression one might think that this case was not in point, but such impression would be based largely upon the fact that Huntoon was an individual rather than a Wharf Company or Railway Company. Huntoon, however was performing the same character of service that was performed by the Belt Line in the many cases cited above and as was to be performed by the Wharf Company in the case at bar. Huntoon's regular business was transporting merchandise from the depot to the railway company to the line of the next connecting carrier. He made a charge for this service which was paid by the carrier. The fact that he was an individual rather than a Belt Line or Wharf Company makes no difference in the application of the principle of agency. As an agent he had a specific duty to perform. Unless he was guilty of negligence in its performance or in the failure to perform such duty, he would not be answerable to his principal for the loss and damage to the goods in his custody. In the case at bar, even if the possession of the shipment had passed to the Wharf Company, the Wharf Company was acting as agent of the carrier to perform a certain service and should not be held responsi-

ble for loss to the shipment unless such was due to its negligence.

We also refer this honorable court to the cases of Wilbur vs. Wabash Railway Company, by the St. Louis Court of Civil Appeals, 129 S. W. 484; Atlanta Natl. Bank vs. Southern Ry. Co., 106 Fed., p. 623 at p. 627.

POINT 3

In our original brief, under Point 3, we took the postion that, if for any reason it should be held at the time of the fire which damaged the shipment involved in this suit the shipment was in the possession of the Galveston Wharf Company, then the Galveston Wharf Company was not responsible except for negligence, because of the provisions in the tariffs of the wharf company filed with the Interstate Commerce Commission and supplied by the wharf company to the Mallory S. S. Company and G. H. & S. A. Railway Company prior to the damage to the shipment. This tariff provides:

> "Under Rates, Name and Items 40, 42, 48 and 50, the Railroad Company from which freight is received or to which freight is delivered, shall be liable for all loss or damage occurring to freight on lines of this Company,

other than through the negligence of this Company, and this Company shall not be liable for any injury to cars while in its possession, except through its own negligence." (Record, Exhibit 86-D, Item 6-C.)"

The G. H. & S. A. Railway Company, in its brief, contends that this provision of the tariff is not applicable, because the rates under Items 40, 42, 48 and 50 apply to the service of the wharf company in switching loaded cars. It will be noted that the exemption from liability is not limited to the items named in the tariff, but the tariff specifically provides that the railroad company to which freight is delivered shall be liable for all loss or damage occurring to freight on lines of this Company. If, at the time of the fire, the shipment was in possession of the Galveston Wharf Company, such shipment was on the lines of that Company, and we respectfully submit that the language "on lines of this Company" in Tariff is sufficiently broad to cover the shipment in question. In the contract between the Galveston Wharf Company and the Mallory S. S. Company covering the leasing of the piers for use by the Mallory S. S. Company, is a provision to the effect that the Wharf company shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves,

sheds and warehouses, unless they be caused by defects in roofs of warehouses, etc. (Record, p. 83.) It will thus be seen that the Galveston Wharf Company took precautions in the handling of the great volume of merchandise passing over its piers, to obtain agreements from the Mallory S. S. Company and the rail lines, which provide in substance that the wharf company should not be liable for loss and damage to such merchandise, except for its negligence. The wharf company was not a party to the bill of lading, it had no contract, express or implied, with the shipper or the consignee named in the bill of lading, the carriers named in the bill of lading were not obligated to use the Galveston Wharf Company at Galveston in transferring various shipments from the depot of the Mallory S. S. Company to the lines of the rail carrier, the services of trucks or draymen could have been used to transfer such shipments, but the carriers named in the bill of lading selected the Galveston Wharf Company, and each of them in substance provided by agreement with the Galveston Wharf Company that that company should not be liable except for negligence. Such an agreement is not against public policy, nor in violation of any Federal Statute, and should not be disregarded merely because the plaintiff, who had a contract with the carriers, the Mallory S. S. Company, and the G. H. & S. A. Railway Company,

had contracted with those two companies that they should be liable for this shipment from point of origin to point of destination as carriers.

CONCLUSION

We respectfully submit that it would be manifestly unjust to hold the Galveston Wharf Company responsible as a carrier for the destruction of the shipment involved in this case at a time when the Mallory S. S. Company was asserting and exercising dominion and control over the shipment, and when the wharf company had not had an opportunity to check the goods with the representatives of the Mallory S. S. Company, and when at the time of the fire the time had not arrived for it to begin the performance of the first service that it was to render, and petitioner prays that the judgment of the Texas Supreme Court be reversed, and for such other relief to which it may be entitled.

Counsel for Galveston Wharf Co.

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